RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

TERRY M. HONEYCUTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Founded in 1958, the National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL's many thousands of members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliated organization and accords it full representation in the ABA House of Delegates.[1]

NACDL files numerous amicus briefs each year in this Court and other federal and state courts, seeking to provide its unique viewpoint in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This is such a case. Joint and several forfeiture liability for drug trafficking imposes draconian judgments out of proportion to an offender's culpability. This case provides the Court with an opportunity to restore the forfeiture statute to the scope Congress intended.

SUMMARY OF ARGUMENT

Criminal forfeiture is a form of punishment traditionally tied to a defendant's actual proceeds from the

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk.

criminal offense. By forcing the defendant to disgorge his ill-gotten gains from a crime, forfeiture serves "to ensure that crime does not pay." *Kaley* v. *United States*, 134 S. Ct. 1090, 1094 (2014).

Joint and several forfeiture liability is different: It requires the defendant to pay the government an amount measured not by his unlawful gains but by the full amount of illicit proceeds that *anyone* received from the crime (or at least those reasonably foreseeable to the defendant). When the crime is a large drug-trafficking conspiracy, a defendant's joint and several forfeiture liability under 21 U.S.C. § 853 will often vastly exceed any personal benefit he may have derived from it. The Court should reject such an anomalous form of punishment for three reasons.

First, joint and several forfeiture liability defies basic principles of proportionality in criminal sentencing, principles Congress has repeatedly endorsed (by, for example, creating the Sentencing Commission). Whereas prison sentences for drug conspirators are calibrated to reflect the defendant's actual role in the conspiracy, joint and several forfeiture may saddle defendants with identical liability notwithstanding significant differences in culpability. The Court should not attribute to Congress a result so plainly at odds with its broader policy judgments in the field of criminal sentencing.

Second, by requiring defendants to pay amounts not limited to their ill-gotten gains, joint and several forfeiture liability amounts to a de facto criminal fine. But joint and several forfeiture judgments are not subject to the constraints Congress has sensibly imposed on de jure fines, such as a requirement that sentencing courts consider a defendant's personal financial circum-

stances and a bar against the seizure of property exempt from levy under certain provisions of the Internal Revenue Code. De facto fines through joint and several forfeiture may also cause a defendant's total financial punishment to exceed the statutory maximums for de jure fines. The Court should not construe § 853 to enable the government to circumvent these limitations simply by applying the "forfeiture" label to what is effectively a fine.

Finally, the Court should construe § 853 to avoid the serious constitutional questions that joint and several forfeiture liability would create. Criminal forfeiture judgments are subject to scrutiny under the Excessive Fines Clause of the Eighth Amendment, and joint and several forfeiture is particularly likely to violate that provision, either categorically or on a case-by-case basis. By allowing forfeiture of lawfully obtained property, joint and several forfeiture liability may also deprive a defendant of funds needed to hire counsel of choice, in violation of the Sixth Amendment. And joint and several forfeiture liability may violate the Due Process Clause by permanently depriving a defendant of all present and future property—a penalty tantamount to a "forfeiture of estate," which the Constitution explicitly prohibits even for the far more severe offense of treason. U.S. Const. art. III, § 3.

ARGUMENT

I. JOINT AND SEVERAL FORFEITURE LIABILITY VIOLATES BASIC PRINCIPLES OF SENTENCING

Congress has made clear that one of the paramount goals of criminal sentencing is proportionality, that is, the imposition of "appropriately different sentences for criminal conduct of different severity." *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1342 (2016)

(quotation marks omitted). In personam forfeiture judgments are part of a criminal defendant's sentence, *Libretti* v. *United States*, 516 U.S. 29, 38-39 (1995), and therefore should be imposed in a manner that "achieve[s] the 'proportionality' goal of treating ... major drug traffickers and low-level dealers ... differently," *Dorsey* v. *United States*, 132 S. Ct. 2321, 2328 (2012). Joint and several liability under § 853 frustrates that objective, by treating every member of a drug conspiracy as if he were a kingpin who reaped all of the proceeds from the conspiracy—no matter how far removed from any profits he was.

Most people involved in drug distribution are not kingpins, or even close. Extrapolating from a sample of 15 percent of all reported drug cases in 2009, the U.S. Sentencing Commission determined that 27.8 percent of the defendants functioned as couriers or "mules" responsible for transporting drugs, and that another 17.2 percent functioned as street dealers. U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 165, 166-167, D-61 (2011).[2] Just 3.1 percent qualified as organizers or leaders, with an even smaller percentage as managers or supervisors. *Id.* at D-61.

Joint and several forfeiture liability is a ruinously disproportionate penalty when imposed on low-level participants in a drug-trafficking enterprise. Such defendants—having profited very little, if at all, from the conspiracy in which they participated—generally lack funds with which to satisfy a large forfeiture judgment.

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[2] *Available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

Consider Stacey Wolford. A young high-school dropout, Stacey lived in a remote corner of Kentucky with Brent Evans, a convicted felon who was ten years her senior and the father of her child. *See* Def.'s Sentencing Mem. 1-2, Dkt. 267, *United States* v. *Wolford*, No. 13-cr-22 (E.D. Ky. Jan. 28, 2015); *see also* Sentencing Tr. 22-23, Dkt. 322, *Wolford* (Feb. 9, 2015). Brent was controlling, jealous, and possessive. Sentencing Mem. 2. On occasion, he directed Stacey to accompany him and others on trips to Texas that he organized to acquire prescription narcotics. *Id.*; Sentencing Tr. 9-12.

Nonetheless, when Stacey was convicted of participation in a drug conspiracy orchestrated by Brent, the Sixth Circuit upheld the district court's ruling holding her jointly and severally liable for $269,700, the full "proceeds of the conspiracy that were reasonably foreseeable to ... her." *United States* v. *Wolford*, 656 F. App'x 59, 66-67 (6th Cir. 2016) (quotation marks omitted); *see also* Sentencing Tr. 65, Dkt. 326, *United States* v. *Evans*, No. 13-cr-22 (E.D. Ky. Feb. 25, 2015). The court of appeals determined that Stacey had "benefitted from the fruits of the conspiracy" because she was Brent's "live-in girlfriend and mother of his child." *Wolford*, 656 F. App'x at 67 (quotation marks omitted). It pointed to no evidence, however, that Stacey had actually obtained any of the drug trafficking proceeds, other than a minivan Brent had purchased for her. *Id.* The court observed that Brent had used drug proceeds to renovate the home he shared with Stacey, *id.*, but did not suggest she had any ownership interest in that home. In short, the court required Stacey to disgorge thousands of dollars worth of assets she never obtained.

Assessing a financial penalty that ignores the severity of a defendant's conduct and the defendant's degree of profit is discordant with how courts otherwise

punish co-conspirators. Under the Sentencing Guidelines, courts adjust prison sentences based on the defendant's relative culpability. For example, § 3B1.1(c) contemplates a two-point offense-level enhancement for an "organizer, leader, manager or supervisor," while § 3B1.2(a) authorizes up to a four-point reduction for defendants who play a minimal role. The district court invoked these two provisions when sentencing Stacey and Brent to prison terms of radically differing lengths—51 months for Stacey, 360 months for Brent. *Wolford* Sentencing Tr. 18-19, 29; *Evans* Sentencing Tr. 67-74, 104. Yet construing § 853 to allow joint and several liability would tell courts to ignore those kinds of disparities in imposing forfeiture. There is no indication that Congress desired the incongruous result that the disparate significance of different defendants' roles in an offense would be reflected in their prison terms but not in other elements of their sentences. Nor does any sound penological rationale support such an approach.

Although the incongruity produced by joint and several forfeiture liability could in theory be ameliorated by a low-level defendant's invocation of a right of contribution, in practice such a right is unavailable. A contribution right may arise "through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or ... through the power of federal courts to fashion a federal common law of contribution." *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981). But neither § 853 nor any other federal law creates a right of contribution in this context. And while an implied right of contribution may be "discerned by looking to the legislative history and other factors," such as "the identity of the class for whose benefit the statute was enacted" and "the overall

legislative scheme," *id.* at 639, the legislative history of § 853 contains no indication that Congress meant that provision to permit contribution for forfeiture judgments. Rather, as the Ninth Circuit observed of another forfeiture provision in determining whether contribution was permitted, § 853 was "decidedly not enacted for the benefit of conspirators." *United States* v. *Guillen-Cervantes*, 748 F.3d 870, 873 (9th Cir. 2014) (addressing 18 U.S.C. § 982(a)(6)(A)). That leaves the common law—but this Court has held that contribution among wrongdoers alone "does not implicate 'uniquely federal interests' of the kind that oblige courts to formulate federal common law." *Texas Indus.*, 451 U.S. at 642.[3]

In short, the imposition of joint and several forfeiture liability under § 853 creates a real risk of punishing defendants out of proportion to the proceeds they obtained or the degree of their participation in a conspiracy. Requiring defendants to disgorge property they never obtained—and thus imposing on them judgments they have little hope of satisfying—without accounting for their role in the offense is out of step with Congress's goal of achieving proportional punishment.

II. Joint And Several Forfeiture Liability Imposes A De Facto Criminal Fine In Contravention Of Congressional Intent

There is ordinarily a sharp distinction between criminal forfeiture judgments and fines: Forfeiture is disgorgement of a defendant's ill-gotten gains, whereas

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[3] Congress did provide in § 853(n) for the rights of third parties claiming an interest in property ordered forfeited. That provision makes all the more glaring the absence of any provision addressing contribution among co-defendants.

a fine is an additional discretionary penalty to be paid from his untainted assets. But where a court orders a defendant to forfeit funds he has never obtained—as here, and as will often be the case with joint and several liability under § 853—there is no meaningful difference between a forfeiture and a fine. Collapsing the distinction between these penalties contravenes congressional intent in multiple ways, indicating that § 853 is not meant to encompass joint and several forfeiture liability.

A. Congress Enacted § 853 To Deprive Defendants Of Their Proceeds From Crime

In personam criminal forfeiture is a form of punishment relatively new to American law. "Although *in personam* criminal forfeitures were well established in England at the time of the founding, they were rejected altogether in the laws of this country until" several decades ago, when Congress first enacted forfeiture provisions "to combat organized crime and major drug trafficking." *United States* v. *Bajakajian*, 524 U.S. 321, 332 & n.7 (1998).

Unlike a fine, which is a discretionary penalty that the defendant must pay to the government using funds he earned legally, Casella, *Asset Forfeiture Law in the United States* § 20-5 (2d ed. 2013), "[c]riminal forfeitures are imposed upon conviction to confiscate assets used in or gained from certain serious crimes," *Kaley* v. *United States*, 134 S. Ct. 1090, 1094 (2014). They are meant to negate any economic incentive for crime—"to ensure," in other words, "that crime does not pay." *Id.*

Congress understood the distinctions between fines and forfeitures when it enacted § 853, and it made clear that it envisioned § 853 as authorizing only the latter

type of punishment—a punishment specifically tied to the defendant's proceeds from the charged offense. The legislative history referred to § 853 as a "mechanism for achieving the forfeiture of *a defendant's proceeds* from his drug trafficking or of other property he has used in the offense." S. Rep. No. 98-225, at 210 (1983) (emphasis added). And Congress distinguished the forfeiture provision from the "traditional criminal sanctions of fine and imprisonment," indicating that the punishments should operate independently. *Id.* at 191. Consistent with the broader history and purpose of criminal forfeiture provisions, Congress thus meant for § 853 to negate the economic incentive for drug trafficking by ensuring that convicted traffickers could not retain their unlawful proceeds.

Reading § 853 to permit joint and several liability would cause it to diverge from the historical origins and purposes of criminal forfeiture provisions—the understanding of forfeiture that informed Congress's enactment of the provision. It would require defendants not just to disgorge their ill-gotten gains but also to pay the government an amount bearing no relationship to their financial gains (if any) from participation in a drug conspiracy.

B. Joint And Several Forfeiture Liability Disregards The Limits Congress Imposed On Fines For Drug Offenders

Divorcing criminal forfeiture from its purpose of requiring defendants to disgorge illicit gains, and thus making it a de facto fine, creates two significant anomalies with existing laws governing criminal fines for drug crimes.

First, joint and several forfeiture liability effectively allows the government to seek (and courts to impose)

fines that exceed the statutory maximum. Ordinarily, drug-trafficking fines are limited to the greater of (1) twice the pecuniary gain resulting from the offense of conviction, 18 U.S.C. § 3571(d), and (2) statutorily prescribed amounts that depend on the drug quantity involved, 21 U.S.C. § 841(b). Interpreting § 853 to permit joint and several liability would effectively allow the government to extract an additional fine measured by the proceeds of the offense, simply by characterizing the amount as a "forfeiture." In cases where the maximum statutory fine is twice the proceeds of a conspiracy, joint and several forfeiture liability in effect allows a fine up to *three* times the proceeds.

Second, de facto fines imposed through joint and several liability would not be subject to important constraints Congress has placed on de jure fines. Specifically, Congress has directed courts to weigh a defendant's personal characteristics and financial circumstances when setting fines for drug offenses. 18 U.S.C. § 3572(a) (requiring courts to consider the factors articulated in 18 U.S.C. § 3553(a); the defendant's income, earning capacity, and financial resources; and the burden that any fine will impose on the defendant and his dependents); *see also* Pet. Br. 32. Section 853 contains no such requirements; indeed, this Court has emphasized that courts cannot adjust a forfeiture award imposed under § 853. *United States* v. *Monsanto*, 491 U.S. 600, 606-607 (1989). Congress has also prohibited the government from satisfying a fine by seizing assets of a defendant that are exempt from levy under certain provisions of the Internal Revenue Code. 18 U.S.C. § 3613(a)(1). Exempt assets include, for example, unemployment benefits and worker's compensation. 26 U.S.C. § 6334(a)(4), (7). Neither these provisions nor any analogous provisions, however, similarly

shield a defendant's assets from being seized to satisfy an unpaid forfeiture judgment.

Reading § 853 to require an inflexible forfeiture in excess of a defendant's ill-gotten gains thus would effectively create a new punishment inconsistent with Congress's choices to set maximum fines for drug crimes, to calibrate fines for drug offenses on the basis of a defendant's personal circumstances, and to limit the government's collection powers.

III. The Court Should Construe § 853 To Avoid Serious Constitutional Problems

"[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider [whether] ... one of them would raise a multitude of constitutional problems." *Clark* v. *Martinez*, 543 U.S. 371, 380-381 (2005). If so, the other construction should prevail, "whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* at 381. That canon is implicated here because if § 853 were construed to allow joint and several forfeiture liability, three serious constitutional concerns would arise.

First, joint and several forfeiture judgments may violate the Eighth Amendment's Excessive Fines Clause, either categorically or on a case-by-case basis. This Court has held that forfeiture of criminal proceeds that a defendant owns can constitute an "excessive" fine. *Bajakajian*, 524 U.S. at 327-334. Indeed, the Court has said that the forfeiture of both assets used to further a RICO enterprise and proceeds from the enterprise is "clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'" *Alexander* v. *United States*, 509 U.S. 544, 548, 558 (1993).

By expanding the scope of forfeiture to require disgorgement of property a defendant never obtained, joint and several liability presents new and challenging questions about Eighth Amendment proportionality. Defendants could persuasively argue that an order to disgorge property never actually obtained is invariably a violation of the Eighth Amendment, since it effectively requires the defendant to do the impossible. At the very least, joint and several liability would increase the magnitude of forfeiture awards in numerous drug conspiracy cases and would thus sharply increase the number of case-specific proportionality challenges that courts must address.

Second, joint and several forfeiture liability under § 853 could violate the Sixth Amendment right to counsel. Just last Term, a majority of Justices agreed that pretrial restraint of property that is "untainted" by the alleged crime—*i.e.*, property that is not the "proceeds obtained from the crime," "contraband," or a "tool[]" used to commit the crime—violates the Sixth Amendment at least insofar as that property is "needed to retain counsel of choice." *Luis* v. *United States*, 136 S. Ct. 1083, 1088, 1090, 1091 (2016) (plurality opinion) (quotation marks omitted); *see also id.* at 1096-1097 (Thomas, J., concurring in the judgment). Joint and several forfeiture liability would implicate the same Sixth Amendment concerns addressed in *Luis* by creating another pathway for the government to deprive defendants of untainted funds often needed to retain counsel of choice. *See* 21 U.S.C. § 853(e)(1)(A) (upon filing of indictment, court may restrain property "for which criminal forfeiture may be ordered" under § 853(a)).

Finally, joint and several forfeiture judgments may violate the Due Process Clause by permanently

depriving a defendant of all present and future property—a penalty tantamount to imposing a "forfeiture of estate," which the Constitution explicitly prohibits for even the far more severe offense of treason.

Forfeiture of estate—the seizure of all "right, title and interest [in property], wheresoever situate[d]," *United States* v. *Thevis*, 474 F. Supp. 134, 140 (N.D. Ga. 1979)—was historically imposed on felons in England. That penalty was deeply disfavored in the United States at the time of the Founding. *United States* v. *Sandini*, 816 F.2d 869, 873 (3d Cir. 1987). Accordingly, the Constitution provides that not even "attainder of treason shall work ... forfeiture except during the life of the person attainted," U.S. Const. art. III, § 3, and the First Congress eliminated "forfeiture of estate" as a penalty for any felonies, Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 112, 117. While Congress compelled forfeiture of Confederate sympathizers' property through the 1862 Confiscation Act, even that penalty was limited to the lives of the offenders. *Bigelow* v. *Forrest*, 76 U.S. (9 Wall.) 339, 351 (1870).

After Congress revived criminal forfeiture in 1970, by enacting RICO's forfeiture provision, 18 U.S.C. § 1963, courts entertained claims that the law violated the Constitution by imposing a punishment prohibited even for treason. Courts upheld the new punishment, however, reasoning that the forfeiture was "limited to that property utilized in the commission of" a crime, and therefore not the equivalent of a forfeiture of estate. *Thevis*, 474 F. Supp. at 141; *see United States* v. *Grande*, 620 F.2d 1026, 1037-1039 (4th Cir. 1980). The one court to have analyzed whether forfeiture under § 853 would constitute a forfeiture of estate similarly concluded that it would not, because § 853 "does not provide that the drug offender must forfeit *all* his or

her property wherever it is and for whatever it is used." *United States* v. *Anderson*, 637 F. Supp. 632, 634 (N.D. Cal. 1986), *rev'd on other grounds sub nom. United States* v. *Littlefield*, 821 F.2d 1365 (9th Cir. 1987).

Joint and several forfeiture liability, however, gives rise to a much more significant risk of working such a complete forfeiture of estate, by depriving a defendant of any and all of his property—present and future—"wherever it is and for whatever it is used," *Anderson*, 637 F. Supp. at 634. Where a low-level conspirator is held liable for proceeds retained entirely by co-conspirators, in an amount many times his net worth or earnings capacity, he may effectively be required to turn over to the government all the property he owns or may ever own. As noted, no statute appears to stop the government from attempting to collect on a § 853 judgment by seizing a defendant's interest in his unemployment benefits, worker's compensation, or any other property exempt from levy under the Internal Revenue Code—even though it would not be able to reach that property if the same penalty were called a fine. This scenario raises serious due process concerns "because of the irrationality of a ruling that forfeiture of estate cannot be imposed for treason but can be imposed for a pattern of lesser crimes." *Grande*, 620 F.2d at1038.

To avoid these thorny constitutional issues, the Court should construe § 853 not to permit the imposition of joint and several forfeiture liability.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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